

Internal Revenue Service
memorandum

TR-45-2109-91

Br2:JTRicotta

date:

to: District Counsel, Brooklyn (Attn: Peggy Gartenbaum)

from: Chief, Branch 2, Office of Associate Chief Counsel (Employee
Benefits and Exempt Organizations) CC:EE

subject: [REDACTED]

This responds to your memorandum of November 14, 1991, concerning the application of section 6205 to the facts of the above-captioned case. The Service determined that [REDACTED] owed income tax withholding and FICA taxes plus interest on per diem amounts paid to employees from [REDACTED] through the second quarter of [REDACTED]. The taxes plus interest were not assessed because the determination was made after [REDACTED] had filed for bankruptcy protection on [REDACTED]. Under the Bankruptcy Code, the filing of bankruptcy by [REDACTED] prevents the Service from assessing the taxes which it has determined [REDACTED] owes. You ask for our comments on [REDACTED]'s memorandum of law concerning this case.

Section 6205 provides that if less than the correct amount of tax imposed by section 3101, 3111, 3201, 3221 or 3402 is paid with respect to any payment of wages or compensation, proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as the Secretary may prescribe by regulations.

Section 31.6205-1 of the Employment Tax Regulations provides that an employer who makes an undercollection or underpayment of employer or employee taxes imposed by section 3101, 3111 or 3402 shall correct such error as provided in that section. The adjustment may constitute an adjustment without interest if described in paragraph (b) or (c) of the regulations.

Under section 31.6205-1(b)(2)(i) of the regulations, if a return is filed with respect to wages paid to an employee and less than the correct amount of employer or employee tax is shown (or if no employer or employee tax is shown), the employer shall adjust the underpayment by either (1) reporting such additional amount due by reason of the underpayment as an adjustment on a return filed on or before the last day on which the return is required to be filed for the return period in which the error is ascertained, or (2) by reporting such additional amount on a supplemental return for the return period in which the payment of wages was made.

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Section 31.6205-1(a)(6) of the regulations provides that no underpayment may be reported pursuant to this section after receipt from the District Director of notice and demand for payment thereof based on an assessment, but the amount shall be paid in accordance with such notice and demand.

Section 31.6205-1(a)(4) of the regulations provides that for purposes of section 6205 an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it. Section 4641.1(3) of the Employment Tax Procedures Manual (regarding interest-free adjustments of FICA) uses the same definition of when an error is ascertained. The Manual also provides that in agreed cases an error is ascertained when the taxpayer signs Form 2504 (Agreement of Assessment and Collection of Additional Tax); in unagreed cases an error is ascertained at the conclusion of the Appeals conference.

Rev. Rul. 75-464, 1975-2 C.B. 474, provides guidance concerning when an error in underreporting employment taxes is ascertained for purposes of section 31.6205-1(a)(4) of the regulations and when certain underpayments of employment taxes can be corrected through interest free adjustments under section 6205. Rev. Rul. 75-464 concludes that an underpayment of employment tax discovered during an audit is ascertained and may be paid interest-free at the time the employer signs the Form 2504, at the conclusion of all appeal rights within the Service but before a notice and demand has been received, or at the time the employer voluntarily pays the amount prior to filing a claim to contest the tax liability in court. The Form 2504 executed by the taxpayer is considered to stand in lieu of a supplemental return required by section 31.6205-1(b) or (c) of the regulations.

Under these authorities, after an error is ascertained the time period of section 31.6205-1(b) or (c) of the regulations during which adjustments can be made interest-free begins to run. Pursuant to Section 31.6205-1(a)(6) of the regulations, no underpayment may be reported interest-free after receipt of notice and demand for payment.

In the present case, [REDACTED]'s underpayment has not yet been ascertained for purposes of section 6205. Accordingly, adjustments to [REDACTED]'s withholding and employment tax liability can be made interest-free under the provisions of section 6205 provided that the requirements of section 31.6205-1(b) or (c) of the regulations are satisfied and provided that adjustment of the tax is made before receipt of notice and demand.